No. 530

In The

Supreme Court of the United States

October Term, 1955

UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFFILIATED WITH THE CONGRESS OF INDUSTRIAL ORGANIZATIONS, UAW-CIO,

Appellant,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD and KOHLER CO., a Wisconsin corporation,

Appellees.

BRIEF OF APPELLEE, WISCONSIN EMPLOYMENT RELATIONS BOARD

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Appellant,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD and KOHLER CO., a Wisconsin corporation,

Appellees.

BRIEF OF APPELLEE, WISCONSIN EMPLOYMENT RELATIONS BOARD

STATEMENT OF THE CASE

The findings of the Wisconsin Labor Relations Board which were the basis of this proceeding were not challenged. As the Wisconsin Supreme Court has pointed out,* a cease-and-desist order and judgment of the nature of the one here challenged must be interpreted in the light of the findings.

Evidence of the activities out of which the challenged order and judgment arose consumed five days. That evi-

*Hotel & R. E. I. Alliance v. Wis. E. R. Board, (1911) 236 Wis. 329, 353, 291 N. W. 632, 295 N. W. 634.

dence has been succinctly and undramatically condensed in the following unchallenged findings: (R. 7-8)

"1. That the officers members and agents of Local Union No. 833, United Automobile Aircraft and Agricultural Implement Workers of America, affiliated with the Congress of Industrial Organizations have engaged and are now engaging in mass picketing at the entrance to the plant of the Kohler Company at the village of Kohler, Wisconsin, and have been assisted and advised in such activities by Frank J. Sahorske, Robert Burkhart, Jess Ferazza, Donald Rand, James Fiore, Frank Walleck and Raymond Majerus, International Representatives of the United Automobile Aircraft and Agricultural Implement Workers of America.

"2. That the officers, members and agents of the Respondent union have attempted by force, threats, intimidation and by mass pickets at the various entrances to the Kohler Company plant in Kohler, Wisconsin, to prevent the lawful work or employment by persons desiring to work for the Kohler Company.

"3. That the officers, members and agents of the Respondent union by gathering in large numbers and mass formation around the various entrances to the Kohler Company and obstructing and interfering with the free use of the public streets in the village of Kohler, Wisconsin, particularly with Industrial Road.

"4. That officers, members and agents of the Respondent Union have forcefully taken into custody persons attempting to enter the plant of the Kohler Company, forced them to accompany such officers, members and agents to the strike headquarters of the Respondent Union and prevented them from pursuing their lawful work and employment. That in addition officers, members and agents of the Respondent Union have followed the cars of persons attempting to enter

or leave the Kohler Company plant and picketed their homes and have threatened the persons desiring to work with physical injury."

On the basis of such findings, the Wisconsin Employment Relations Board entered an order requiring the appellant, its officers, members and agents to cease and desist from such activities (R. 9). The board's order was enforced by judgment of the Circuit Court of Sheboygan County, Wisconsin, and affirmed by the Supreme Court of Wisconsin.

SUMMARY OF ARGUMENT

I. The state's judgment, requiring the appellant and its members to desist from mass picketing, injury to persons and property and similar conduct, is attacked solely on the contention that sec. 8 (b) (1) (A) of the Taft-Hartley Act gave the National Labor Relations Board exclusive power to regulate such activities. Proponents of sec. 8 (b) (1) (A) repeatedly stated in Congressional debates that it was not intended to prevent states from regulating coercive activities, but to *encourage* better law enforcement on a state and local level. Congressional records show that Congress felt the need to control labor violence was so urgent that there should be effectual remedies on both the national and local level, and that actual "duplication" of remedy should be permissible. References in debates to state labor boards and state labor laws show that Congress had under consideration the substantial number of state labor laws then in existence, and intended to give approval to such local regulation. Congress desired that states should

regulate in the manner they found most effectual to eliminate labor violence.

II. The state's judgment dealt with actual and threatened breaches of the peace. This court has repeatedly stated that Congress did not preempt regulation of such activities, but that such regulation remains within the reserved powers of states.

The state action under review is almost identical with that which this court held in the *Allen-Bradley case* to be a proper exercise of state police power. This court has referred approvingly to state regulation in the manner of the *Allen-Bradley case* at least four times since enactment of the Taft-Hartley Act.

The circumstances here present a far stronger case for state jurisdiction than did those of *International Union v. Wisconsin E. R. Board*, (1949) 336 U. S. 245, 69 S. Ct. 516, 93 L. ed. 651, so that to invalidate the state action here would necessarily result in overruling that case. Congress has indicated its approval of the decision in that case by failing to make a change in the law.

State and lower federal courts have interpreted this court's decisions as leaving in states authority to issue judgments preventing violence and mass picketing.

As this court has held, sec. 10 (a) does not authorize the National Labor Relations Board to cede to states jurisdiction as to matters which Congress has left within the reserved powers of states; and states have authority to act in such cases without any cession agreement.

II. As the *Allen-Bradley case* held, the validity of the state's action is to be determined on the basis of the spe-

cific findings and order, and upon only those provisions of the state law which were applied.

The state's action does not attempt to curtail any rights guaranteed by federal law.

The state has not applied the provisions of its law upon which the appellant bases its claim of conflict. The provisions here applied have no parallel in federal law; and the remedy granted is not one which could be given by the National Labor Relations Board.

The National Board has held that its authority under sec. 8 (b) (1) (A) is limited to requiring unions and their *agents* to desist from coercing *employees* of specified employers in their rights under sec. 7.

The state's action prohibits violence and mass picketing *per se*, because of infringement of rights of third parties, irrespective of whether the acts are committed by persons acting as agents of the appellant or for the purpose of coercing employees.

The state's action does not prohibit coercion of employees of the Kohler Company in the rights guaranteed to employees by sec. 7 of the Taft-Hartley Act; but prohibits coercion and intimidation of third persons in their legal rights as *citizens* rather than as *employees*.

IV. By preventing unlawful conduct, the state aids, rather than infringes upon, functions of the National Labor Relations Board. The state preventive action preserves the subject matter, so that an order issued by the national board can be effective after its necessarily time-consuming deliberations have been completed. The state

did not pass upon questions of employee status or upon any other issues which may be decided by the national board. The state action could not interfere with *any* remedial order which is within the power of the national board.

The same proceedings have stood together in the past, with advantage to administration of both federal and state laws, and without objection by the national board.

The National Labor Relations Board has expressed no objection to local action of this type but, on the contrary, has recognized this type of regulation as appropriate for states.

V. Immediate preventive action of the kind here used is a necessity if violence is to be controlled in the manner envisioned by Congress. Unless immediate action can be taken in the locality where breaches of the peace occur, the damage will have been irrevocably done.

ARGUMENT

I.

CONGRESS INTENDED THAT ENACTMENT OF THE TAFT-HARTLEY ACT SHOULD NOT CURTAIL AUTHORITY OF STATES TO PREVENT SUCH ACTIVITIES AS MASS PICKETING AND VIOLENCE IN LABOR DISPUTES

A.

The Legislative History of the Taft-Hartley Act Shows that Congress Intended by Sec. 8 (b) (1) to Encourage Supplemental Regulation by States

Congress has not expressly precluded states from regulating in the field of labor relations; but, on the contrary, the Labor Management Relations Act, 1947 "leaves much to the states."[1] The extent to which federal legislation has preempted the field, so as to preclude state action, is one of Congressional intent; and this court has several times had occasion to seek enlightenment from the Congressional records.[2]

The appellant contends that the state's action, which seeks to prevent mass picketing, picketing of homes, obstruction of highways and driveways, violence, and threats of violence, infringes upon the exclusive jurisdiction of the

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[1] Garner v. Teamsters Union, (1953) 346 U. S. 485, 488, 74 S. Ct. 161 98 L. ed. 228.

[2] Algoma Plywood & Veneer Co. v. Wisconsin Employ. R. Board, (1949) 336 U. S. 301, 69 S. Ct. 584, 93 L. ed. 691;
Garner v. Teamsters Union, (1953) 346 U. S. 485, 488, 74 S. Ct. 161, 98 L. ed. 228.
United Workers v. Laburnum Corp., (1954) 347 U. S. 656, 74 S. Ct. 833, 98 L. ed. 1025;
Au'n. of Westinghouse, etc. Employees v. Westinghouse E. Corp., (1955) 348 U. S. 437, 75 S. Ct. 489, — L. ed. —.

National Labor Relations Board, under sec. 8 (b) (1) (A) of the Labor Management Relations Act, 1947, (29 U. S. C. 158 (b) (1)). The latter provision makes it an unfair practice for a "labor organization or its agents" to restrain or coerce "employees" in the exercise of their legal rights.

The discussions on House Conference Report #510 on H. R. 3020, 80th Congress, which contained an even more comprehensive provision on coercion, furnish positive indication that Congress did not intend to invalidate the provisions of the state law now before the court, at least when so applied as not directly to conflict with provisions of the federal law. See Legislative History of the Labor Management Relations Act, 1947, p. 883, where the following questions and answers appear:

> "MR. KERSTEN of Wisconsin. * * * I would like to ask the gentleman about that portion which pertains to the validity of State laws. Wisconsin and other States have their own labor relations laws. We are very anxious that disputes be settled at the State level insofar as it is possible. Can the gentleman give us assurance on that proposition, so that it is a matter of record, that that is the sense of the language and of the report?
>
> "MR. HARTLEY. That is the sense of the language of the bill and of the report. That is my interpretation of the bill, that this will not interfere with the State of Wisconsin in the administration of its own laws. In other words, this will not interfere with the validity of the laws within that State.
>
> "MR. KERSTEN of Wisconsin. And it will permit as many of these disputes to be settled at the State level as possible?
>
> "MR. HARTLEY. Exactly."

This court quoted in *United Workers v. Laburnum Corp.*, (1954) 347 U. S. 656, 668, 74 S. Ct. 833, 98 L. ed. 1025, the following excerpt from Senate Report No. 105, 80th Cong., 1st Sess. 50, 1 Legislative History of the Labor Management Relations Act, 1947, p. 456:

> "* * * Some of these acts are illegal under State law, but we see no reason why they should not also constitute unfair labor practices to be investigated by the National Labor Relations Board, and at least deprive the violators of any protection furnished by the Wagner Act."

The quoted excerpt refers to coercion by unions under sec. 8 (b) (1).

The *Laburnum* decision, loc. cit. 347 U. S. 668-669, also quoted the following comment of Senator Taft:

> "* * * But suppose there is duplication in extreme cases; suppose there is a threat of violence constituting violation of the law of the State. Why should it not be an unfair labor practice? It is on the part of the employer. If an employer proceeds to use violence, as employers once did, if they use the kind of goon-squad tactics labor unions are permitted to use—and they once did—if they threaten men with physical violence if they join a union, they are subject to State law, and they are also subject to be proceeded against for violating the National Labor Relations Act. There is no reason in the world why there should not be two remedies for an act of that kind."
>
> 2 Legislative History of the Labor Management Relations Act, 1947, p. 1031.

The conduct described in the findings of the state board, and proscribed by its order, establishes this as one of the

"extreme cases" which Congress was so desirous of preventing that it felt there must be *additional* remedies; and that even actual "duplication" of remedies should be permitted.

One of the motives urged as a basis for adopting sec. 8 (b) (1) (A) of the Taft-Hartley Act was to *encourage* local agencies to take stronger steps to prevent this type of conduct. Among the local laws which Congress had in mind in offering such inducement was the type of law which Wisconsin has here applied. The following statement of Senator Ball, for example, refers to the violence in the Allis-Chalmers strike in Milwaukee which was handled by exactly the same type of order as that now before the court.[9]

Senator Ball, in urging enactment of sec. 8 (b) (1), said:

> "It is true, as the Senator from Oregon has stated, that some types of union coercion, including the violence of the mass picket line, visits to the homes of employees, such as have taken place in the Allis Chalmers strike in Milwaukee, and other such tactics are violations of State law in almost every State. I believe that the main remedy for such conditions is prosecution under State law and better local law enforcement. But I believe that one reason why we have had weak law enforcement in labor relations is that the Federal Government, through the Wagner Act and the Norris-LaGuardia Act, has in effect taken the position—and it has been so interpreted by the Supreme Court—that no Federal law restrains labor unions in any kind of activity in which they wish to indulge, including secondary boycotts, all kinds of monopolistic practices,

[9] Wisconsin E. R. Board v. Allis-Chalmers W. Union, (1946) 249 Wis. 590, 25 N. W. 2d 425.

and clear abuses of the original intent of the closed shop and union shop.

"It is no wonder that local communities and their peace officers have been reluctant vigorously to enforce law when they saw that the great Federal Government was holding the unions exempt from any kind of Federal regulation. The only laws we have had restrain employers and not unions. So it may well be that many of the types of activities of unions which we are seeking to restrain somewhat by this mild amendment are the kind of activities which would be corrected by good local law enforcement. *But I think we shall encourage that kind of local law enforcement* if the Federal Government, acting through Congress, states clearly its position that individual employees are entitled to their right of self-organization free from coercion from any source, whether it be the employer, the union, or some outside source." (Emphasis supplied)

2 Legislative History of the Labor Management Relations Act, 1947, p. 1471.

Senator Wiley, who supported the legislation, called the attention of the Senate to regulation by state labor boards, shortly before the respective Senate and House bills were referred to the conference committee:

"I have urged my colleagues on the Labor Committee, who will take this bill to conference, to insure the concurrent jurisdictions of State labor boards and the National Labor Board, so that insofar as possible each of the State boards may handle problems at the State level, rather than attempt to send all of the problems to Washington to be decided far from the scene of the dispute."

2 Legislative History of the Labor Management Relations Act, 1047, p. 1471.

The following provision, originally adopted by the House, (H. R. 3020, sec. 12 (a) (1)), which closely parallels sec. 111.06 (2) (f) of the Wisconsin Statutes, 1955, was omitted from the Taft-Hartley Act upon passage:

> "Sec. 12. (a) The following activities, when affecting commerce, shall be unlawful concerted activities:
>
> "(1) By the use of force or violence or threats thereof, preventing or attempting to prevent any individual from quitting or continuing in the employment of, or from accepting or refusing employment by, any employer; or by the use of force, violence, physical obstruction, or threats thereof, preventing or attempting to prevent any individual from freely going from any place and entering upon an employer's premises, or from freely leaving an employer's premises and going to any other place; or picketing an employer's place of business in numbers or in a manner otherwise than is reasonably required to give notice of the existence of a labor dispute at such place of business; or picketing or besetting the home of any individual in connection with any labor dispute."
>
> 1 Legislative History of the Labor Management Relations Act, 1947, pp. 204-205.

The omission of the provision demonstrates that the Congress did not intend to enter into *detailed* regulation respecting such activities as mass picketing, violence, and obstruction of streets.

The primary objective of sec. 8 (b) (1) was to reach economic coercion similar to the employer pressure previously reached by the parallel provision of sec. 8 (a) (1). With respect to violence, Congress intended "at least" to "deprive the violators of any protection" of federal law; and to give the national board the authority "also" to take

action if necessary to supplement state regulation. Such terms, quoted from Senate Report # 105, are explained and amplified in the following statement of Senator Ball as to the objective of sec. 8 (b) (1):

"So far as that goes, the mass picketing situation is not a major objective. What we are trying to reach here, it seems to me, is the coercive activity in which some unions and their agents indulge in their organizational and election campagins; and, as the Senator from Oregon himself has said, those do not tend to be any tea parties; they frequently become rather rough.

"It seems to me that if they indulge in the same threats and coercion which, on the part of an employer, would be held to be unfair labor practices, they should be held accountable before the National Labor Relations Board for that activity. It might not have been necessary to do that in 1935, when the original act was passed; but I submit that the position of unions and their leaders and business agents in American industry today is infinitely different from what it was in 1935. Today they have very great power. Most of manufacturing industry today is covered by union agreements. The business agents and the unions are the exclusive representatives of all the employees, and I think it is generally accepted throughout industry that the ultimate objective of the labor movement is to organize every plant in the country. Knowing that, the individual employee is very likely to be easily influenced by any hint of coercion on the part of a union organizer and any threats made by these organizers carry much more weight today than they would have carried 10 or 15 years ago."

2 Legislative History of the Labor Management Relations Act, 1947, p. 1203.

"The purpose of the amendment is simply to provide that where unions, in their organizational cam-

paigns, indulge in practices which, if an employer indulged in them, would be unfair labor practices, such as making threats or false promises or false statements, the unions also shall be guilty of unfair labor practices.

"* * *

"In the past 2 years there have been a number of cases before the National Labor Relations Board, mostly contesting the results of elections, in which unfair practices of this type were alleged. Such practices are not covered by any State law. They do not go to the extent of violence, although quite often violence follows later. Such tactics are used by unions in organization and election campaigns.

"* * *

"The common practice in organization campaigns is for the business agent to threaten all employees and tell them that if they do not join the union before the election, or vote for it, they will be charged double initiation fees afterward. That is done in a great many cases. It is clearly an attempt to coerce and threaten employees in the exercise of the freedoms guaranteed by the act. However, such practices do not fall within the purview of State laws against violence and that sort of thing.

"* * *

"* * * if the unions, in their organizing drives, cannot persuade a majority to join voluntarily, they place a picket line in front of the shop, make scurrilous remarks about the employees as they go to work, and subject them to all kinds of abuse, even verging on physical violence, but very often not reaching the point where State laws would come into effect."

2 Legislative History of the Labor Management Relations Act, 1947, pp. 1018-1020.

To the same effect is the reply of Senator Taft to the question whether there was not a difference between economic pressure exerted by an employer and that exerted by a union:

> "MR. TAFT. I cannot see any difference. If a man is invited to join a union its members ought to be able to persuade him to join, but if they should not be able to persuade him they should not be permitted to interfere with him, coerce him, and compel him to join the union. The moment that such a man is threatened with losing his job if he does join, it at once becomes an unfair labor practice. Threats and coercion ought to become unfair labor practices on the part of a union.
>
> "* * *
>
> "* * * Certainly it seems to me that if we are willing to accept the principle that employees are entitled to the same protection against labor union leaders as against employers, then I can see no reasonable objection to the amendment proposed by the Senator from Minnesota.
>
> "* * *
>
> "MR. TAFT. The main threat was, 'Unless you join our union, we will close down this plant, and you will not have a job.' That was the threat, and that is coercion-something which they had no right to do."
>
> 2 Legislative History of the Labor Management Relations Act, 1947, pp. 1027, 1028, 1029.

There was no indication by *any* proponents of the bill that sec. 8 (b) (1) was intended to supplant state regulation. It was in response to arguments by opponents of the bill (i.e. that regulation of such tactics as mass picketing and violence should be left to states) that the assur-

ances above quoted were given. The gist of remarks of all *supporters* of the bill was that the provision was intended to *supplement* state legislation, not to supplant it.

Both proponents and opponents of the Taft-Hartley Act were in agreement that mass picketing and violence should be prevented. A typical statement is that of Senator Ives, 2 Legislative History of the Labor Management Relations Act, 1947, p. 1024:

> "If, in the city of New York, or in any other places, 'goon' squads enter into a plant to disrupt business, or anything of that nature or character occurs, we can have only complete condemnation for such action. But the answer to activities of that kind is not a proposal such as this. As was pointed out in the memorandum I read, there would be weeks, months, perhaps more than a year before action would be taken under this provision. For such things as 'goon' squads, the only answer is immediate and decisive police action, and if the authorities of the city of New York, or of any other place, are notified and do nothing about such a situation, then I have nothing but condemnation for such authorities.
>
> "The trouble is that in too many localities people are taking too many of these absolutely unpardonable actions as a matter of course. * * *"

B.

Expressions By Proponents of Sec. 8 (b) (1) that States Should Continue to Regulate Mass Picketing and Like Activities Did Not Relate Solely to Criminal Prosecutions. They Referred as well to the Many State Labor Statutes then in Existence

The appellant argues that the repeated references by proponents of sec. 8 (b) (1) to local law enforcement must be construed as limited exclusively to "existing criminal law," (Appellant's Brief, p. 37) and not to include "enforcement of state labor policy." (Appellant's Brief, p. 38)

That is belied by the express references, not only in the above excerpts but in many others, to state *labor relations laws*. The Wisconsin law, for example, was several times called to the attention of the Congress, including the very provisions here involved.[4] The Wisconsin law which, then as now, provided a remedy for unfair practices both by employers and employees, preceded the Taft-Hartley

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[4]See, for example, the following statement of Senator Taft, 2 Legislative History of the Labor Management Relations Act, 1947, p. 1032:

"Mr. President, I should like to call attention to the fact that the amendment proposed by the Senator from Minnesota [Mr. Ball] is practically contained in the Wisconsin Labor Relations Act and has been used in Wisconsin as a means not only of preventing the coercion of employees but also of attempting, bringing such action as can be brought by administrative law, to end mass picketing. Of course, if administrative law fails, it would be necessary finally to resort to the police powers of the State. The Wisconsin Act provides that it shall be an unfair labor practice on the part of unions—

"To hinder or prevent, by mass picketing, threats, intimidation, force, or coercion of any kind, the pursuit of any lawful work or employment, or to obstruct or interfere with entrance to or egress from any place of employment, or to obstruct or interfere with free and uninterrupted use of public roads, streets, highways, railways, airports, or other ways of travel or conveyance.

"The Wisconsin provision goes further even than the proposed amendment, and is more definite: * * *"

Act by 8 years; and had several times been before the United States Supreme Court.[1]

The references in the Congressional deliberations to state and local law were made in the light of the considerable volume of state labor legislation then in existence.

The summary appearing at pages i-iii in the forepart of *Recent State Labor Legislation*, by Edward F. Staniford, published by the Bureau of Public Administration, University of California, describes in general the labor legislation enacted by states in the 10 years prior to the Congressional deliberations on the Taft-Hartley Act:

> "Prior to 1937, state legislation regulating industrial relations was confined to piecemeal laws restricting certain practices of labor and management. The Supreme Court decision, in 1937, upholding the Wagner Labor Relations Act, encouraged numerous states to enact similar comprehensive labor relations acts. In that year, Wisconsin, New York, Massachusetts, Pennsylvania, and Utah, followed later by Rhode Island in 1941 and Connecticut in 1945, enacted their so-called Little Wagner Acts. * * *
>
> "Beginning in 1939, there was a shift in the emphasis of state labor relations acts from a protective to a restrictive policy. By 1939, Wisconsin reenacted a more stringent labor relations act. Pennsylvania, later followed by Massachusetts and Utah, amended its original act by inserting restrictive clauses. Michigan, Minnesota, Colorado, and Kansas soon placed re-

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[1] **Hotel & R. E. I. Alliance v. Wis. E. R. Board,** (1942) 315 U. S. 437, 86 L. ed. 946, 62 S. Ct. 706;

Allen-Bradley Local 1111 v. Wisconsin E. R. Board, (1942) 315 U. S. 740, 62 S. Ct. 820, 86 L. ed. 1154;

Christoffel v. Wisconsin E. R. Board, (1943) (cert. den.) 320 U. S. 776, 88 L. ed. 466, 64 S. Ct. 99.

strictive clauses into their newly enacted labor relations acts. * * *

"A concurrent development was the passage of state legislation regulating or prohibiting specific types of union and employee activities. A number of these laws were adopted in 1943, but the peak year was 1947 when thirty states passed union regulatory laws. Unlike labor relations acts, these laws aim almost exclusively at specific union methods and employee activities. * * *

"* * *

"Thus, the significant trend in state labor laws in the past decade is the growth of governmental regulation of labor-management relations. Such extension has largely followed the evolution of the National Labor Relations Board from the Wagner Act of 1935 to the Taft-Hartley Act of 1947. * * *"

An article by Harry A. Millis and Harold A. Katz, entitled *A Decade of State Labor Legislation 1937-1947*, which appeared in 15 University of Chicago Law Review 282-310, says in part:

"A decade has elapsed since Wisconsin in 1937 became the first state to adopt a labor relations act. Since then no fewer than forty-two states have passed legislation affecting industrial relations and labor organizations. Ten of these states have adopted labor relations laws comparable to the federal statutes of 1935 and 1947. The others singled out some specific problems which have been dealt with on more of a piecemeal basis. The fact that such a large number of states have seen fit to regulate aspects of labor union activity indicates a widespread belief on the part of state legislators that an overriding public interest is involved in labor-management relations. Certainly there

has at no time been such widespread legislation in this field among the states.

"* * *

"* * * It is interesting to note that from the great mass of state legislation came many of the provisions of the Labor Management Relations Act of 1947. Congressmen had not been unaware of what had been transpiring in their home states. * * *

"* * * The 1943 sessions of the state legislatures resulted in a great volume of labor legislation, and, notably, the beginning of widespread regulation of the organization, 'internal affairs' and procedures of labor unions. The banner year in state labor legislation was, however, 1947, when thirty states enacted statutes regulating or restricting union activities. * * *

"* * *

"* * * Legislation concerning union security provisions, coercion of non-union workers, picketing, boycotts, strikes, breach of contract and political action has been widespread. Such laws have been found in some states in statutes which regulate this or that aspect of labor activity. They have also been found in the labor relations acts, often added by subsequent amendment. * * *."

Ten states had complete labor relations acts comparable to the Taft-Hartley Act prior to enactment of the latter. As stated in the foregoing article, 15 University of Chicago Law Review, 284-285, and in the footnote on page 285:

"The most comprehensive formulation of public policy regarding collective bargaining and union activity is found in the ten states which have adopted labor relations acts. * * *

"* * *

Footnote, p. 285. "Colorado, 1943; Connecticut, 1945; Massachusetts, 1937; Michigan, 1939; Minnesota, 1939; New York, 1937; Pennsylvania, 1937; Rhode Island, 1945; Utah, 1937; Wisconsin, 1937. While the Kansas statute of 1943 and the Delaware enactment of 1947 are fairly extensive in scope, it is not felt that they properly fall under the heading of labor relations acts. The use of that term is here confined to acts administered by labor relations boards or commissions."

In addition, Hawaii and Porto Rico had similar legislation.*

Other state labor regulation was by no means limited to criminal laws of general application. Even where state laws regulating union conduct provided penalties enforceable by criminal procedure, they were nonetheless enactments of state labor policy. It is said in *Recent State Labor Legislation*, supra, at p. 12:

"Since 1937 almost all states which have not enacted comprehensive labor relations acts have passed laws regulating certain union activities. Restrictions have been placed on union tactics, objectives, and internal affairs. * * *"

When proponents of the Taft-Hartley Act referred to enforcement of state and local regulation, in their discussions dealing with labor relations, it can not be presumed that they intended to ignore the substantial volume of state

*Session Laws of Hawaii, Regular Session of 1945, Series A-68, Act 250; Laws of Porto Rico, 1938, Act 148.

labor relations laws, and to refer only to a segment of the criminal law. (Appellant's Brief, p. 33).

There are, naturally, references to criminal procedure in the Congressional debates. Some of such references were made by opponents of the bill, who argued against *any* further regulation of union activities—whether state or national.[1] Arguments of opponents of the legislation as to why it should *not* be passed can hardly be a reliable indication of the intent of those other legislators who adopted the legislation over their objection—any more than the intent of parties to a contract can be determined by statements of third persons.

In any event, the gist of the argument of opponents of the measure was not that the remedy must be by criminal procedure in order to be effective; but that the remedy must be immediate and expeditious. It was argued (and generally agreed) that procedure before the National Labor Relations Board would necessarily involve "an administrative hearing, followed months or years later by a cease-and-desist" order.[2]

If states should find other methods more expeditious than criminal trials of individuals (which are often notoriously time-consuming, particularly when courts are crowded and offenses numerous), surely the legislators who agreed that mass picketing and violence should be prevented did not desire to foreclose the more expeditious procedure.

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[1] e.g. The statement that the law was not needed "because an effective remedy • • • is quick arrest, criminal trial," etc., referred to at p. 38 of appellant's brief.

[2] 2 Legislative History of the Labor Management Relations Act, 1947, p. 1021.

C.

The Appellant Argues that Reference in Congressional Debates to "two remedies" was Intended to Preclude any Regulation of Mass Picketing and Violence Except:

(1) Proceedings before the National Labor Relations Board

(2) Prosecution Under General Criminal Laws of States.

The Argument Disregards the Substance of the Statement

The appellant has lifted an excerpt from the statement of Senator Taft on the question of federal-state jurisdiction (Appellant's brief, p. 34); and argues that, whereas the senator envisioned "two" remedies, the appellee's position calls for "three".

Reading the statement in context makes it clear that when Senator Taft used the term "two remedies" he was not referring to specific forms of proceedings at the local level. He envisioned one remedy on a *national* basis and another on a *local* basis, rather than any stereotyped form of action. Further, he envisioned a remedy as a cure—not merely a piece of litigation.

The very fact that he mentioned "two" remedies indicates that he was referring to parallel, or similar remedies—one on a national and one on a local basis. If he had intended to comprehend the forms of procedure which have been traditionally invoked to deal with a labor dispute, in absence of labor legislation, he would have had to use a far larger number than two.

There are *hundreds* of traditional remedies which would lie for the conduct described in the findings of the Wisconsin board. There would be criminal trials for assault, for false imprisonment, and for wilful damage to property, hundreds of civil forfeiture proceedings under local ordinances, for traffic violations, suits for injunctions by private parties against mass picketing,* suits for injunctions by transportation companies for interference with deliveries, suits by individuals to restrain picketing of their homes, actions to require security to keep the peace, thousands of suits for damages for injuries to people and their property, *ad infinitum.*

If all such individual remedies should fail to prevent the unlawful conduct, the traditional remedies include martial law.

Congress was certainly aware that calling out troops was one of the traditional methods to which states had sometimes resorted under their police power to cope with labor violence. Such means had been used for many decades. It is reported in Brief History of the American Labor Movement by the United States Department of Labor, 81st Congress, 2d Session, House Document No. 662, that:

> "In 1877 the railroad strikes, which originated in Pittsburgh but spread throughout the country, brought

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*"• • • there exists a right of injunction today. There is a right of injunction against mass picketing. There is a right of injunction in other labor disputes. • • •"
Senator Taft, 2 Legislative History of the Labor Management Relations Act, 1947, 1395.

"Courts frequently have specified how many pickets should patrol entrances to plants." House Report 245 on H. R. 3020, 80th Congress, 1 Legislative History of the Labor Management Relations Act, 1947, p. 335.

in their wake riots, martial law, intervention of State and Federal troops, and some fatalities. * * *"

Surely it should not be argued that Congress ever intended federal laws to be so interpreted as to foreclose states from preventive remedies which fairly warn individuals what they can and cannot do, but would leave them free to resort to the "traditional" method of calling out the troops.

Such a multiplicity of procedures was not what Senator Taft had in mind when he referred to "two remedies." His statement was that "duplication" of remedies would not be objectionable. The remedy under the Wisconsin Act is by no means a "duplication" of one available under the federal law; but, even if it were, the Congressional desire to put a stop to violence was so strong as to permit actual duplication if necessary.

It has always been true that if an act violates a criminal law and also infringes upon civil rights of others, the perpetrator may be subject to liability in several forms of action. That has never been considered "duplication." Senator Taft was well acquainted with the English vocabulary, and presumably meant exactly what he said.

The Wisconsin law now being challenged has truly endeavored to provide the *one* additional remedy envisioned by Senator Taft, in lieu of the hundreds of other ineffectual procedures. The challenged action imposes no penalties; but, by defining in advance what is permissible, it seeks by *one* remedy to preserve the subject matter of the dispute for adjustment through "processes of justice" instead of

"trial by combat."[10] It seeks only to avoid a multiplicity of suits and to prevent the type of "extreme" conduct which all members of Congress, both proponents and opponents of the law, agreed should not be tolerated."[11]

The gist of the comments of proponents of the bill is that the kind of conduct involved in this case should be stopped; and that whatever "remedies" are necessary to effect that end should be supplied.

D.

Even If the Expressions in Congressional Debates, of Intent to Leave Authority in States, Were Limited to "State and Local Police Laws," that Term Includes the Regulation now Before the Court, Both Under the Decisions of this Court and in Common Parlance

The appellant takes the position that the term "state and local police laws" (Appellant's brief, p. 35) which was so "frequently referred to in Senatorial debates" includes only the criminal codes. Such an interpretation is far too restrictive.

Although the case of *Allen-Bradley Local 1111 v. Wisconsin E. R. Board*, (1942) 315 U. S. 740, 62 S. Ct. 820, 86 L. ed. 1154 was decided before enactment of the Taft-Hartley Act, that does not alter the fact that the court there recognized that the precise law involved in this case was

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[10]Duplex Printing Press Co. v. Deering, (1921) 254 U. S. 443, 448, 65 L. ed. 349, 41 S. Ct. 172. Dissent.

[11]For example, see the following comment of Mr. Landis:

"The Constitution • • • does not give us the right to block the entrance to places of employment and prevent employees from entering and leaving. Therefore, mass picketing must be abolished." 1 Legislative History of the Labor Management Relations Act, 1947, pp. 583-584.

"not basically different from the common situation where a state takes steps to prevent breaches of the peace in connection with labor disputes," and that it was an exercise of the state's "historic powers over such traditionally local matters as public safety and order and the use of streets and highways." (loc. cit. 315 U. S. 749, 751.)

Even in common parlance, the term "police laws" could not be so narrowly interpreted as the appellant seeks. The following is the complete definition of the noun "police," in Webster's New International Dictionary, Second Ed., except for that part relating to the military:

"1. Policy; sagacity or diplomacy in affairs; craft; also, civilization; social or group organization. *Now rare.*

"2. The internal organization or regulation of a state; the control and regulation of a community or state through the exercise of the constitutional powers of government; esp., such control and regulation with respect to matters affecting the general comfort, health, morals, safety, or prosperity of the public; by extension, the control and regulation of the affairs affecting the general order, health, etc. (as the cleanliness of a camp), of any community; also, the organization or system of laws for effecting such control.

"3. a The department of government charged with the enforcement of the laws and the maintenance of public order, safety, health, etc., having executive, judicial, and, in the broadest sense, legislative functions; now, esp., the department of government charged with the prevention, detection, and prosecution of public nuisances, crimes, etc. Its powers and functions vary widely in different states, municipalities, communities. * * *"

Certainly a law directed toward prevention of breaches of the peace and abatement of a public nuisance is a "police law" within the foregoing definition.

Surely the Congress, in its references to "state and local police laws," used the term in the sense in which this court had applied it in the *Allen-Bradley* case rather than in the restricted sense of a "Cops-and-Robbers" game.

Even if it were conceded that Congress had in mind some type of state control involving the enforcement of statutory prohibitions by uniformed policemen, the regulation here challenged could meet such narrow test. Under Ch. 111 of the Wisconsin Statutes certain prohibitions are prescribed on a parallel with the statutory prohibitions inherent in criminal laws, except that these prohibitions are prescribed only after a full hearing and court review. A criminal law, according to the appellant, might be enacted to prohibit mass picketing. Obviously what constitutes mass picketing may vary according to the circumstances. Five pickets might constitute a sufficient number to obstruct ingress to a small store whereas ten pickets might not do so in connection with a large plant. Under general criminal laws, each individual would be subject to the hazard of guessing what constitutes mass picketing in any given instance. In Wisconsin, rather than subject an individual to the hazard of general criminal laws of uncertain application against mass picketing, the legislature has provided a method of adapting the prohibitions to the circumstances, after a complete hearing, findings of fact, and court review, without penalty. This aids not only the persons desirous of conforming to law in ascertaining without jeopardy what

is permissible and what is not, but it aids the local law enforcement officers whom the appellant concedes have a duty to prevent breaches of the peace. The most conscientious of law enforcement officers find it difficult, if not impossible, to prevent mass picketing through enforcement of criminal laws of general application, without legal guidance. The proscriptions of a board order, issued after hearing, provide the direction under which both enforcement officers and participants can know what is unlawful.

E.

Congress, in Expressing the Purpose to Leave Authority in States to Control Such Activities as Violence and Mass Picketing, Intended to Permit States to Regulate Effectively. It Did not Intend to Restrict Them to Methods Congress Had Found Ineffectual

The appellant has asserted that sec. 8 (b) (4) resulted from Congressional concern over the "supposed failure of local law enforcement." (Appellant's Brief, p. 11) At the same time, it asserts that Congress was speaking only in terms of "generally applicable criminal laws." (Appellant's Brief, p. 35) If Congress felt impelled to seek a new remedy because enforcement of criminal laws was deemed ineffectual, surely statements in the debates that the legislation was not intended to preclude state regulation of the condemned conduct should not be construed to mean Congress intended to leave the states *only* the methods which it regarded as ineffectual.

The fact that the Wisconsin law has been brought before this court at least seven times," by parties whose activities were curbed, demonstrates its effectiveness. By the same token, few of the cases brought to this court respecting unlawful activities in labor disputes have arisen through criminal prosecutions. That very fact may be one of the bases upon which Congress determined that attempts to prevent violence in labor disputes *solely* through enforcement of criminal law was ineffectual.

"Hotel & R. E. I. Alliance v. Wis. E. R. Board, (1942) 315 U. S. 437, 86 L. ed. 946, 62 S. Ct. 706

Allen-Bradley Local 1111 v. Wisconsin E. R. Board, (1942) 315 U. S. 740, 62 S. Ct. 820, 86 L. ed. 1154

Christoffel v. Wisconsin E. R. Board, (1943) 320 U. S. 776, 88 L. ed. 466, 64 S. Ct. 90

International Union v. Wisconsin E. R. Board, (1949) 336 U. S. 245, 69 S. Ct. 516, 93 L. ed. 651

La Crosse Telephone Corp. v. Wisconsin Employ. Rel. Bd., (1949) 336 U. S. 18, 69 S. Ct. 379, 93 L. ed. 463

Algoma Plywood & Veneer Co. v. Wisconsin Employ. R. Board, (1949) 336 U. S. 301, 69 S. Ct. 584, 93 L. ed. 691

Pienkinton Packing Co. v. Wisconsin E. R. Board, (1950) 338 U. S. 953, 70 S. Ct. 491, 94 L. ed. 588

II.

THE DECISIONS OF THIS COURT UNDER THE TAFT-HARTLEY ACT HAVE BEEN GENERALLY INTERPRETED AS HOLDING THAT STATES HAVE AUTHORITY TO REGULATE THE KIND OF CONDUCT HERE INVOLVED, UNDER THEIR LABOR STATUTES. CONGRESS HAS INDICATED ITS APPROVAL OF SUCH INTERPRETATION BY MAKING NO CHANGE IN THE PROVISIONS OF THE LAW ON WHICH IT IS BASED

A.

The State's Action In this Case Dealt Only with Conduct Involving Breaches of the Peace, Calling for "Extraordinary police measures."[11] The Statutory Provisions, Under which the Specific Restrictions Were Defined, Apply to All Persons, Irrespective of Membership In a Labor Organization, In the Same Manner as Any Prohibitions In a Criminal Code

The appellant argues that because Wisconsin has singled out but "one phase of a complex labor dispute," its action undermines the comprehensive Congressional scheme for regulation. (Appellant's Brief, p. 13) It is the very fact that the state action *does* single out one phase of the matter which brings it in the field recognized by Congress and by this court as appropriate for local regulation. Indeed, the appellant seems to concede that point in suggesting that states might deal with the conduct under criminal laws. (Appellant's Brief, p. 35) If, as appellant asserts, Congress intended that these breaches of peace must be dealt with exclusively as a part of an "integrated whole" so that one

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[11]Garner v. Teamsters Union, (1953) 346 U. S. 485, 74 S. Ct. 161, 98 L. ed. 228.

"cannot separate out parts of the conduct * * * and deal with it separately" (Appellant's Brief, p. 41), it would be difficult to rationalize the proposition that the *same* conduct might be proscribed by one *method* but not another.

However that may be, the appellant's contentions are contrary to the pronouncements of this court; and would, indeed, actually require reversal of at least one case.

This court has always recognized that the Taft-Hartley Act leaves *some* phases of the "complex labor dispute" within the field for state regulation. One of the most recent statements is contained in *Garner v. Teamsters Union*, (1953) 346 U. S. 485, 74 S. Ct. 161, 164, 98 L. ed. 228:

> "The national Labor Management Relations Act, as we have pointed out, leaves much to the states, though Congress has refrained from telling us how much. We must spell out from conflicting indications of congressional will the area in which state action is still permissible."

The particular phases of the industrial problem here proscribed by the state are comprehended in the findings of the state board, that the appellants engaged in "mass picketing," "force, threats, intimidation," "obstructing and interfering with the free use of public streets," having "forcefully taken into custody persons" and "forced" them to go to strike headquarters, having "followed the cars of persons," having "picketed their homes" and threatening them "with physical injury," etc. (R. 7-9).

The board imposed no penalty, but issued a cease and desist order. As noted in *Hotel & R. E. I. Alliance v. Wis.*

E. R. Board, (1942) 315 U. S. 437, 86 L. ed. 946, 62 S. Ct. 706, 708, the cease and desist order operates against only the type of violence and mass picketing which the state board found had been committed. As was there said, "The appellants could not be ordered to cease and desist from something they were not engaged in."

If the state could proscribe such conduct by criminal law of general application, and make it punishable in the first instance, it would seem anomalous to say that it can *not* proscribe it after a full hearing, by drawing the prohibitions more clearly than is possible under a general statute. Surely such a clear definition of proscribed conduct, which omits all punishment for first offenses, places the perpetrators in less jeopardy than if they must meet the hazard of deciding for themselves how many pickets may congregate on a sidewalk to avoid violating a criminal law against mass picketing.

The fact that a prohibition is applied in administration of a labor relations law makes it no less a prohibition which would be applied against "unorganized private persons" than if it were in an anti-trust statute. Sec. 111.06 (3), Wis. Stats. 1955, makes the restrictions of the state law applicable to "any person" who does "in connection with * * * any controversy as to employment relations" any act prohibited to employers or employees. The law applies, of course, only to persons found to have engaged in such acts; just as a criminal statute prohibiting the sale of milk under unsanitary conditions applies only to persons who engaged in the sale of milk. The prohibitions are nonetheless of general application because they describe the circumstances under which they apply.

B.

Decisions of This Court Have Expressly and Repeatedly Recognized Authority of States to Regulate Exactly as Was Done in this Case

As counsel for the appellant have pointed out, both the law, the circumstances, and the specific order attacked are substantially identical with those involved in the case of *Allen-Bradley Local 1111 v. Wisconsin E. R. Board*, (1942) 315 U. S. 740, 62 S. Ct. 820, 86 L. ed. 1154.

It is quite true, as the appellant states, that the *Allen-Bradley* case was decided before the enactment of the Taft-Hartley Act.

This court has, however, in at least four cases decided since the enactment of the Taft-Hartley Act, recognized that jurisdiction over this type of conduct still rests with states. In *Garner v. Teamsters Union*, (1953) 346 U. S. 485, 488, 74 S. Ct. 161, 98 L. ed. 228, it was said:

> "* * * We have held that the state still may exercise 'its historic powers over such traditionally local matters as public safety and order and the use of streets and highways.' *Allen-Bradley Local v. Wisconsin Board*, 315 U. S. 740, 749. Nothing suggests that the activity enjoined threatened a probable breach of the state's peace or would call for extraordinary police measures by state or city authority. * * *"

This court said in *International Union, etc. v. O'Brien*, (1950) 339 U. S. 454, 459, 70 S. Ct. 781, 95 L. ed. 978:

> "* * * That activity we regarded as 'coercive,' similar * * * to the labor violence held to be subject

to state police control in *Allen-Bradley Local v. Wisconsin Board*, 315 U. S. 740 (1942). * * *"

In *International Union v. Wisconsin E. R. Board*, (1949) 336 U. S. 245, 69 S. Ct. 516, 93 L. ed. 651, the following appears:

"It seems to us clear that this case falls within the rule announced in Allen-Bradley that the state may police these strike activities as it could police the strike activities there, because Congress has not made such employee and union conduct as is involved in this case subject to regulation by the federal Board. * * *"

In the latter case, decided under the provisions of the Taft-Hartley act, this court commented that policing of "actual or threatened violence to persons and property is left wholly to states," and that "no one questions the states' powers to police coercion" accomplished by means of injury to property and threats to employees."

In *Weber v. Anheuser-Busch, Inc.*, (1955) 348 U. S. 468, 75 S. Ct. 480, the court said:

"4. On the other hand, in the following cases the authority which the State exercised was found not to have been exclusively absorbed by the federal enactments.

"In Allen-Bradley Local v. Wisconsin Employment Relations Board, 315 U. S. 740, 10 LRRM 520, the State was allowed to enjoin mass picketing, threats of bodily injury and property damage to employees, obstruction of streets and public roads, the blocking of entrance to and egress from a factory, and the picketing of employees' homes. * * *"

"loc. cit. 336 U. S. 253.

In a more recent case, *United Workers v. Laburnum Corp.*, (1954) 347 U. S. 656, 74 S. Ct. 833, 98 L. ed. 1025, this court again recognized the areas for state jurisdiction which were described in the excerpt from the *Garner case* by saying:

> "* * * The care we took in the *Garner* case to demonstrate the existing conflict between state and federal administrative remedies in that case was, itself, a recognition that if no conflict had existed, the state procedure would have survived. * * *"

C.

Where the Subject Matter Has Not Been Preempted by Congress, This Court Has Held States Free to Use any Method of Regulation They Deem Best. Regulation of Labor Violence, Upon Findings of Unfair Labor Practices Defined by State Statute, Has Been Expressly Recognized By this Court As a Proper Exercise of State Police Control

In determining whether the specific conduct regulated was a proper field for state action, this court has never turned its decisions upon whether the state action was taken under a labor statute, under a criminal statute, or under common law rules; or whether the action resulted from direct court procedure or administrative regulation.

The *Garner* case involved the efforts of a private party to obtain a court injunction against conduct which was an

unfair practice under the federal law. This court held the state was precluded from exercising jurisdiction despite the fact that there was not involved any state unfair practice or administrative remedy.

In the case of *International Union, etc. v. O'Brien*, (1950) 339 U. S. 454, 70 S. Ct. 781, 94 L. ed. 978 the question arose by petition for an injunction to restrain criminal prosecution under a state statute which, although it carried a criminal penalty, was designated by this court as a state "labor mediation law."

In the case of *International Union v. Wisconsin E. R. Board*, (1949) 336 U. S. 245, 69 S. Ct. 516, 93 L. ed. 651 (the *Briggs-Stratton* case) where it was held there was no conflict, the procedure was by cease-and-desist order, upon findings of unfair practice as defined by state labor statute, *identical to the procedure in this case.*

In *Weber v. Anheuser-Busch, Inc.*, (1955) 348 U. S. 468, 75 S. Ct. 480, L. ed. , the question of state jurisdiction was again presented upon application for injunction by a private party against conduct which was specifically alleged to come "within the prohibitions of the federal act," as well as being contrary to state law dealing with restraint of trade.

The case of *United Workers v. Laburnum Corp.*, (1954) 347 U. S. 656, 74 S. Ct. 833, 98 L. ed. 1025 was an action for damages for common law tort.

It is significant that the only one of the five cases in which a proper field for state regulation was recognized dealt with a remedy for unfair labor practices defined by state statute—the same remedy and the same statute in-

volved in the Allen-Bradley case, and in the case now before the bar.

This court in the *O'Brien* case commented that it had held in the *Allen-Bradley* case that labor violence was "subject to state police control," thus expressly recognizing that Wisconsin's unfair labor practice regulation is a form of police control."

Similarly, in *International Union v. Wisconsin E. R. Board*, (1949) 336 U. S. 245, 254, 69 S. Ct. 516, 93 L. ed. 651, the court referred to the "rule announced in *Allen-Bradley*," that the state may "police" these activities by the identical method used in this case.

The court has thus applied to regulation under the Wisconsin labor statute the very terms which the appellant argues can refer only to general criminal law.

D.

This Court Has Expressly Ruled Against the Appellant's Contention that States Are Precluded from Regulating Under Unfair Practice Procedure. Where the Subject Matter Has Not Been Preempted, There is no Preemption of Method

The appellant suggests that it is clear the state has no authority to prevent any *other* union conduct than that involved in this case, nor *any* employer unfair practices (Appellant's Brief, p. 13). The appellant overlooks (as did the party making the same contentions in *Algoma Plywood & Veneer Co. v. Wisconsin Employ. R. Board*, (1949) 336

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[11]loc. cit. 359 U. S. 459.

U. S. 301, 69 S. Ct. 584, 587, 93 L. ed. 691) that Congress has left to the states the prevention of any unfair practices not expressly "(*listed in section 8*)."

The court said in the *Algoma case*, supra:

> "* * * It argues that the grant to the National Labor Relations Board of 'exclusive' power to prevent 'any unfair labor practice' thereby displaced State power to deal with such practices, provided of course that the practice was one affecting commerce. But this argument implies two equally untenable assumptions. One requires disregard of the parenthetical phrase '(listed in section 8)'; the other depends upon attaching to the section as it stands, the clause 'and no other agency shall have power to prevent unfair labor practices not listed in section 8.'
>
> "The term 'unfair labor practice' is not a term of art having an independent significance which transcends its statutory definition. The States are free (apart from pre-emption by Congress) to characterize any wrong of any kind by an employer to an employee, whether statutorily created or known to the common law, as an 'unfair labor practice.' * * * So far as appears from the Committee Reports, however, § 10 (a) was designed, as its language declares, merely to preclude conflict in the administration of remedies for the practices proscribed by § 8. The House Report, after summarizing the provisions of the section, adds, 'The Board is thus made the paramount agency for dealing with the unfair labor practices described in the bill.' * * *"

At page 22 of its brief the appellant has indicated that the court is concerned primarily with the question whether there is a similarity of *remedy*. That is true only in the event there is also an identity of subject matter. The gist

of the decision in *United Workers v. Laburnum Corp.*, (1954) 347 U. S. 656, 74 S. Ct. 833, 98 L. ed. 1025 is that before exclusion of state action will be presumed there must be *both* infringement of preempted subject matter and duplication of remedy. In that case there was identity of substance but not of remedy. In the case of *Algoma Plywood & Veneer Co. v. Wisconsin Employ. R. Board*, (1949) 336 U. S. 301, 69 S. Ct. 584, 93 L. ed. 691 there was identity of remedy but not preemption of substance. Accordingly, it follows that, if the *subject matter* is one left to states, they may regulate through the same *remedy* which Congress has provided for regulation of other subject matter.

There are many aspects of the employment relation for which an administrative remedy through the unfair practice procedure is provided by states. Minnesota, for example, has made it an unfair labor practice for an employer to pay less than the applicable rates set in his union contract to an employee hired away from another employer. See 15 LRRM 2203.

Wisconsin has made it an unfair practice for either an employer or a union to violate a collective bargaining agreement. This court's decision in *Ass'n of Westinghouse, etc. Employees v. Westinghouse E. Corp.*, (1955) 348 U. S. 437, 75 S. Ct. 489, —L. ed. —, was cited by the National Labor Relations Board in *United Telephone Co.*, 112 N. L. R. B. #103, in holding that the board was not the proper forum for parties seeking to remedy breach of contract. Surely it would not be contended that states are precluded from supplying an expeditious remedy for contract violation, through the unfair practice procedure, where such

violation has not been made an unfair practice under federal law.

E.

In Order to Sustain Appellant's Contentions that the State Had no Jurisdiction in this Case, It Would Be Necessary Not Only to Abandon the Pronouncements of this Court and of Congress as to State Authority to Control Mass Picketing and Labor Violence; It Would Also Be Necessary to Overrule in toto International Union v. Wisconsin E. R. Board, (1949) 336 U. S. 245, 69 S. Ct. 516, 93 L. ed. 651 (The Briggs-Stratton Case). Since Congress Has Taken no Action to Indicate Dissatisfaction with such Pronouncements and Ruling, There is no Ground for Abandoning Them

The case now before the court is identical with *International Union v. Wisconsin E. R. Board,* (1949) 336 U. S. 245, 69 S. Ct. 516, 93 L. ed. 651, except that there is no doubt Congress intended the conduct in *this* case to be proper subject matter for state action; whereas there were no such clear indication of Congressional intent with respect to the conduct *there* involved. The court found the nature of the conduct in that case questionable enough to require considerable analysis before it was determined to be within the purview of state control.

With respect to the kind of conduct now before the court, however, it was there said:

> "* * * In this case there was also evidence of considerable injury to property and intimidation of other

employees by threats and no one questions the state's power to police coercion by those methods.'"[16]

Even with respect to the concerted activities there involved, falling far short of the violence and mass picketing here prohibited, the court resolved all the questions now raised against the contentions of the appellant.

Both this case and the *Briggs-Stratton case*, supra, deal with activities which the court has held are not protected by federal legislation. Both deal with practices which the National Labor Relations Board is without "express"[17] power to prevent.

In that case as in this, however, it was urged that, although there is no provision in the federal law defining precisely the same conduct as an unfair practice, the conduct might be considered by the National Labor Relations Board as an element involved in other definitions of unfair practices. In that case, it was urged that the national board was authorized to determine whether the so-called "quickie strikes" were an unfair practice as a refusal to bargain under sec. 8 (b) (3) of the Taft-Hartley Act; or as a defense under sec. 8 (a) (1), if an employer were charged with an unfair practice for disciplinary measures. It was in reply to these contentions that the court said:

"* * * However, as to coercive tactics in labor controversies, we have said of the National Labor Relations Act what is equally true of the Labor Management Act of 1947, that 'Congress designedly left open

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[16]loc. cit. 336 U. S. 253.

[17]Garner v. Teamsters Union, (1953) 346 U. S. 485, 488, 74 S. Ct. 161, 98 L. ed. 228.

an area for state control' and that 'the intention of Congress to exclude the States from exercising their police power must be clearly manifested.' *Allen Bradley Local v. Wisconsin Employment Relations Board*, 315 U. S. 740, 750, 749. We therefore turn to its legislation for evidence that Congress has clearly manifested an exclusion of the state power sought to be exercised in this case.

"Congress made in the National Labor Relations Act *no express delegation of power to the Board to permit or forbid this particular union conduct*, from which an exclusion of state power could be implied. * * *" (Emphasis supplied)

Apparently the appellant recognizes that its position would require overruling the *Briggs-Stratton case, supra*. It questions the wisdom of this court's having prejudged the issue "without prior National Labor Relations Board proceedings"; and adds that they "believe under more recent decisions a different result might have been reached." (Appellant's Brief, p. 31)

Apparently it is the appellant's position that the question what subject matter is preempted under the Taft-Hartley Act should be determined on a case-by-case basis by the National Labor Relations Board. We doubt if Congress ever intended that legal issues as to jurisdictional preemption under the Taft-Hartley Act should be subject to so much fluctuation and uncertainty as they would be if left to a case-by-case determination by an administrative agency. Certainly there was no indication that the changes effected by the Taft-Hartley Act were intended to conform to recommendations of the National Labor Relations Board with respect to what should constitute un-

pair practices within its exclusive discretion. To the contrary, as commented by Senator Taft in the debates upon the bill:

> "The distinguished Senator from New York cited the opposition of the National Labor Relations Board to the particular amendment we are discussing. I think it should be made perfectly clear that the National Labor Relations Board came before our committee and opposed every amendment to the National Labor Relations Act. The only amendments to which they agreed were amendments which had already been forced upon them by action of the Supreme Court. They were willing to have those written into the law."
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> 2 Legislative History of the Labor Management Relations Act, 1947, p. 1031.

Indeed, one of the major tenets in revision of federal legislation on labor matters was curtailment of the power of the national board, and the elimination of administrative "expertise". See, for example, the following commentary in House Conference Rept. No. 510, on H. R. 3020, 80th Congress, 1 Legislative History of the Labor Management Relations Act, 1947, pp. 559-560:

> "* * * In many instances deference on the part of the courts to specialized knowledge that is supposed to inhere in administrative agencies has led the courts to acquiesce in decisions of the Board, even when the findings concerned mixed issued of law and of fact. * * *
>
> "As previously stated in the discussion of amendments to section 10 (b) and section 10 (c), by reason of the new language concerning the rules of evidence and the preponderance of the evidence, presumed expertness on the part of the Board in its field can no

longer be a factor in the Board's decisions. While the Administrative Procedure Act is generally regarded as having intended to require the courts to examine decisions of administrative agencies far more critically than has been their practice in the past, by reason of a conflict of opinion as to whether it actually does so, a conflict that the courts have not resolved, there was included, both in the House bill and the Senate amendment, language making it clear that the act gives to the courts a real power of review."

This curtailment of board functions was offered by Representative Hartley as one means by which Congress proposed to "protect the validity of state laws on labor." He introduced his commentaries on revision of the national board's organization and functions by the following remark:

> "This bill once again protects the validity of State laws on labor. Here is how we do it. * * *"
>
> 1 Legislative History of the Labor Management Relations Act, 1947, p. 883.

When the court has published pronouncements and decisions based upon an interpretation of Congressional intent, the failure of Congress to change the provisions of the law upon which the interpretation is based indicates that Congress is satisfied with the meaning attributed to the law.

No sound basis is advanced for departing from the pronouncements that regulation of mass picketing and violence is left to states, as in the *Garner case*, supra; and that the state may police such conduct under unfair practice statutes, as held in the *Algoma* and *Briggs-Stratton cases, supra.*

F.

The Authority of the National Labor Relations Board to Cede Jurisdiction to States under Sec. 10 (a) Is Limited to Subject Matter Over Which the National Labor Relations Board Has Exclusive Jurisdiction. If Control of the Subject Matter Is Not Preempted, the National Board Has no Power to Cede Jurisdiction; and States May Continue to Exercise Their Reserved Power Without Cession

The state's action in prohibiting mass picketing and violence in this case was taken under the power reserved to it by Article X of the Constitution. No permission from an administrative agency is prerequisite to the exercise of a reserved power unless Congress has first withdrawn such power.

This was the situation in *International Union v. Wisconsin E. R. Board*, (1949) 336 U. S. 245, 69 S. Ct. 516, 93 L. ed. 651. There the court was not concerned with the power of the National Labor Relations Board to cede jurisdiction, because there was no preemption in the first instance.

The court first examined the law to see whether Congress intended to preempt regulation of the specific conduct, because "the intention of Congress to exclude the States from exercising their police power must be clearly manifested." The court then said:

> "* * * We therefore turn to its legislation for evidence that Congress has clearly manifested an exclusion of the state power sought to be exercised in this case."

Having concluded that Congress did not intend to exclude states, and that the state's action was a "resort to its own reserved power over coercive conduct"[11] the fact that there had been no cession of jurisdiction by the National Labor Relations Board was of no significance.

As pointed out in *Algoma Plywood & Veneer Co. v. Wisconsin Employ. R. Board,* (1949) 336 U. S. 301, 69 S. Ct. 584, 93 L. ed. 691:

> "* * * These words must mean that cession of jurisdiction is to take place only where State and federal laws have parallel provisions. Where the State and federal laws do not overlap, no cession is necessary because the State's jurisdiction is unimpaired. * * *"

The national board, itself, recognizes that there are certain spheres in which it can avail itself of local action to facilitate its administratio., without first ceding jurisdiction.

See, for example, *T. H. Products Co.,* 113 N. L. R. B. #12, Lab. Cas. Par. 53,177, in which the National Board ruled that elections conducted by state officials would be given the same effect as those conducted by the national board in applying the one-election-a-year rule. See, also, *Marvin Wave Clip Co.,* Lab. Cas. Par. 53,231, in which the board held that a union which has established its majority in a state-conducted election was entitled to the benefit of the national board's contract-bar policy.

In the *Speilberg Mfg. Co.* (LLR June 23, 1955) Lab. Cas. Par. 52,968, the national board recognized an arbi-

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[11]loc. cit. 336 U. S. 264.

trator's award, to the effect that employees' activities were such as to justify an employer in refusing to reinstate them after a strike.

Since the National Labor Relations Board has never executed an agreement ceding jurisdiction to a state, there is no exact precedent as to what might be a proper case.

There have, however, been a number of decisions by this court indicating what circumstances and conditions are necessary in order to indicate an intent to exclude state regulation.

One test was stated by this court in *International Union v. Wisconsin E. R. Board,* (1949) 336 U. S. 245, 69 S. Ct. 516, 93 L. ed. 651:

> "Congress made in the National Labor Relations Act no express delegation of power to the Board to permit or forbid this particular union conduct, from which an exclusion of state power could be implied. * * *"

Garner v. Teamsters Union, (1953) 346 U. S. 485, 74 S. Ct. 161, 98 L. ed. 228 indicated "public safety and order and the use of the streets and highways," and threats of "a probable breach of the state's peace" which "would call for extraordinary police measures by state or city authority" are areas reserved to states.

Weber v. Anheuser-Busch, Inc., (1955) 348 U. S. 468, 75 S. Ct. 480 indicates that presumption of preemption exists with respect to "precisely the same conduct," for which a remedy is provided through federal unfair practice procedure.

On the basis of the excerpts from Congressional debates, and the decisions of this court, it would seem that, under the following situations, it was not intended that the powers of the national board should be exclusive. In such circumstances states may exercise their reserved powers without cession of jurisdiction. This proposition is qualified, of course, by the assumption that state regulation may not conflict with the policies of federal law.

1. "Extreme cases" of coercion, involving threatened breaches of the peace. Since the Congressional debates indicated there might be actual "duplication" in these cases, and since such comments related solely to sec. 8 (b) rather than 10 (a), it is clear Congress intended states should act under reserved rather than under ceded jurisdiction.

2. Cases where the specific state regulation is under a statutory provision which has no "parallel" in federal law."

3. Cases with respect to which Congress made "no *express* delegation of power to the Board to permit or forbid this particular union conduct."[10] (Emphasis supplied)

4. Cases where the state remedy is not applied to "precisely the same conduct"[11] made an unfair practice under federal law.

The analysis of the specific state action under review, to demonstrate that it did not invade the field with respect

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[9] Algoma Plywood & Veneer Co. v. Wisconsin Employ. R. Board, (1949) 336 U. S. 301, 69 S. Ct. 584, 93 L. ed. 691

[10] International Union v. Wisconsin E. R. Board, (1949) 336 U. S. 245, 69 S. Ct. 516, 93 L. ed. 651

[11] Weber v. Anheuser-Busch, Inc., (1955) 348 U. S. 468, 75 S. Ct. 480

to which Congress gave the National Labor Relations Board *exclusive* jurisdiction, appears under a succeeding heading.

G.

State Courts Have Uniformly Interpreted Decisions of This Court As Leaving Authority In States to Regulate Mass Picketing, Injury to Persons and Property, and Similar Conduct. If Congress Had Not Deemed Such Decisions Satisfactory, It Would Have Changed the Law

Since the determination of this court in the *Garner* case,[11] states have almost uniformly respected the doctrine of federal preemption in the field of peaceful picketing.[12]

State and federal courts have generally understood the decisions of this court, however, as indicating that states are free to continue regulation of mass picketing and violence under whatever local laws they had found most effective. For example, see:

Oil Workers International Union v. Superior Court, (1951) 103 Cal. App. 2d 512, 230 P. 2d 71;

Williams v. Cedartown Textiles, (1952) 208 Ga. 659, 68 S. E. 2d 705;

Douglas Public Service Corp. v. Gaspard, (1954) 225 La. 972, 74 So. 2d 182;

McQuay, Inc. v. U. A. W., (1955) — Minn. —, 72 N. W. 2d 81;

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[11] *Garner v. Teamsters Union*, (1953) 346 U. S. 485, 74 S. Ct. 161, 98 L. ed. 228;

[12] See, for example, *Wisconsin E. R. Bd. v. Chauffeurs, etc. Local 200*, (1954) 267 Wis. 356, 66 N. W. 2d 318.

Southern Bus Lines v. Amalgamated Ass'n. etc., (1949) — Miss. —, 38 So. 2d 765;

Tallman Company v. Latal, (1955) — Mo. —, 284 S. W. 2d 547;

Erwin Mills v. Textile Workers Union of America, C. I. O., (1951) 234 N. C. 321, 67 S. E. 2d 372;

Royal Cotton Mills Co. v. Textile Workers Union, (1951) 234 N. C. 545, 67 S. E. 2d 755;

Erwin Mills v. Textile Workers Union of America, C. I. O., (1952) 235 N. C. 545, 68 S. E. 2d 813;

Rice & Holman v. United Electrical Radio & Mach. Wkrs., (1949) 3 N. J. Super. 258, 65 A. 2d 638;

Art Steel Co. v. Velasquez (1952) 280 App. Div. 76, 111 N. Y. S. 2d 198;

Wortex Mills v. Textile Workers Union of America, (1954) 380 Pa. 3, 109 A. 2d 815;

Lodge Mfg. v. Gilbert, (1953) 195 Tenn. 403, 260 S. W. 2d 154;

International Molders & F. W. U. v. Texas Foundries, (1951) Tex. Civ. App., 241 S. W. 2d 213;

Johnston v. Colonial Provision Co., (1954) (D. C. Mass.) 128 F. Supp. 954;

Westinghouse E. Corp. v. I. U. E., (1956) (D. C. N. J.) 37 LRRM 2414.

Similarly, in commenting on this court's decision in the *Garner* case, it was said in *Labor Relations Reporter*, December 21, 1953, 33 Analysis 29:

"* * * It [the Garner decision] notes that the picketing involved no injurious conduct, mass patrolling, threats or other similar conduct not within the

express power of the NLRB and hence presumably subject to state action. * * *"

It is recognized that these interpretations are not controlling upon this court. It is submitted, however, that the fact that Congress made no modification of the federal legislation to counteract such trend is indicative of its satisfaction with the interpetation that such matters as mass picketing and violence are subject to preventive action by states.

III.

THE PORTIONS OF THE STATE LAW APPLIED IN THIS CASE DO NOT CONFLICT WITH FEDERAL LAW BY INTERFERING WITH ACTIVITIES PROTECTED BY THE LATTER. NEITHER DO THEY INFRINGE AN AREA PREEMPTED BY THE FEDERAL LAW

A.

The Validity of the State Action Is to Be Determined on the Basis of the Specific Findings and Order, and the Specific Provisions of the State Statute applied

It is conceded that this court has held that certain provisions of Ch. 111 of the Wisconsin Statutes are invalid as applied to disputes affecting commerce.[11]

As pointed out in *Allen-Bradley Local 1111 v. Wisconsin E. R. Board*, (1942) 315 U. S. 740, 62 S. Ct. 820, 86 L. ed. 1154:

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[11] E.g. Plankinton Packing Co. v. Wisconsin Employ. Rel. Bd., (1950) 338 U. S. 953, 70 S. Ct. 491, 94 L. ed. 588.

"We are not under the necessity of treating the state Act as an inseparable whole. Cf. *Watson v. Buck*, supra. Rather, we must read the state Act for purposes of the present case as though it contained only those provisions which authorize the state Board to enter orders of the specific type here involved. That Act contains a broad severability clause. * * *"

As will be later shown, the state board did not in this case attempt to apply portions of the state law which appellant contends infringe the authority of the federal board under sec. 8 (b) (1) (A).

B.

The State Action Does Not Affect the Status of Employees Nor Impose Other Penalties. It Proscribes Certain Unlawful Activities Which Are Not Protected by Federal Law

The judgment of the state court under review does not impose any penalty, nor does it purport to pass upon the status of any employees, nor their rights to reinstatement. It does no more than to define a course of conduct which is to be deemed unlawful if engaged in thereafter. Such proscribed course of conduct is not protected under the federal act.

The omission, in enactment of the Taft-Hartley Act, of the provisions of sec. 12 (a) (1) of H. R. 3020, which declared force, violence, threats, physical obstruction, mass picketing, and picketing of domiciles to be unlawful concerted activities, was not intended to signify that such conduct could be approved or authorized. On the contrary,

it was explained in House Conference Rept. No. 510, or H. R. 3020, 80th Congress, that the omission was primarily due to a fear that a specific enumeration of certain unlawful activities might give rise to arguments that other types of unlawful concerted activity were protected. The report stated, in part:

> "Thus, the courts have firmly established the rule that under the existing provisions of section 7 of the National Labor Relations Act, employees are not given any right to engage in unlawful or other improper conduct. * * *
>
> "By reason of the foregoing, it was believed that the specific provisions in the House bill excepting labor practices, unlawful concerted activities, and violation of collective bargaining agreements from the protection of section 7 were unnecessary. Moreover, there was real concern that the inclusion of such a provision might have a limiting effect and make improper conduct not specifically mentioned subject to the protection of the act."
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> 1 Legislative History of the Labor Management Relations Act, 1947, pp. 542-543.

This court said in *Allen-Bradley Local 1111 v. Wisconsin E. R. Board*, (1942) 315 U. S. 740, 62 S. Ct. 820, 86 L. ed. 1154, of the identical activities here proscribed:

> "* * * And we fail to see how the inability to utilize mass picketing, threats, violence, and the other devices which were here employed impairs, dilutes, qualifies or in any respect subtracts from any of the rights guaranteed and protected by the federal Act. Nor is the freedom to engage in such conduct shown to be so essential or intimately related to a realization of the guar-

antees of the federal Act that its denial is an impairment of the federal policy. * * *" (loc. cit. 750)

C.

The Portions of the State Law Applied In This Case Have No Parallel In the Federal Law; nor Does the National Board Have Power to Grant the Remedy Provided by the State

The appellant's contention that the state action is invalid is grounded solely on the argument that it infringes an area as to which sec. 8 (b) (1) (A) gives the National Labor Relations Board exclusive jurisdiction.

Reference to Congressional records with respect to sec. 8 (b) (1) (A) shows that the conduct covered by the state's order is of a kind for which Congress intended there might be actual "duplication" of remedies.[22]

If duplication is permissible, it may seem superfluous to demonstrate that there is in fact no duplication here.

Since, however, the state board and state court have carefully delimited their remedy to try to avoid infringement of any area preempted by sec. 8 (b) (1) (A), such delimitation should be noted.

The provisions of sec. 8 (b) (1) (A), upon which the appellant urges the state regulation infringes, make it an unfair labor practice "for a labor organization or its agents * * * to restrain or coerce * * * employees in the exercise of the rights guaranteed in section 7."

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[22] 2 Legislative History of the Labor Management Relations Act, 1947, p. 1081.

The appellant urges that in this case the state applied a parallel provision, sec. 111.06 (2) (a), Wisconsin Statutes 1955, which it has quoted *in toto*. The only violation of subsec. (2) (a) included in the findings of the board was "picketing the domicile of persons desiring to work at the Kohler Company" (R. 8)."

The main portion of the state board's findings is predicated on sec. 111.06 (2) (f) and 111.06 (3), Wisconsin Statutes 1955, which, in combination, make it an unfair practice for "any person":

> "To hinder or prevent, by mass picketing, threats, intimidation, force or coercion of any kind the pursuit of any lawful work or employment, or to obstruct or interfere with entrance to or egress from any place of employment, or to obstruct or interfere with free and uninterrupted use of public roads, streets, highways, railways, airports, or other ways of travel or conveyance."

The quoted provision is not solely, nor even primarily, concerned with the relations between the employer and employee involved in a particular labor dispute; but is rather an implementation of the policy of the state statute enunciated as follows:

> "It is also recognized that whatever may be the rights of disputants with respect to each other in any controversy regarding employment relations, they should not be permitted, in the conduct of their controversy, to intrude directly into the primary rights of third parties to earn a livelihood, transact business and

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"As this court pointed out in **Hotel & R. E. I. Alliance v. Wis. E. R. Board**, (1942) 315 U. S. 437, 86 L. ed. 946, 62 S. Ct. 706, the prohibitions are to be interpreted in the light of the findings.

engage in the ordinary affairs of life by any lawful means and free from molestation, interference, restraint or coercion." (Sec. 111.06 (3), Wis. Stats. 1955)

Since the specific portions of the statutes here involved will be repeatedly referred to, they are set out for more convenient reference in the appendix to this brief.

There are several major differences between any remedy which could be granted under sec. 8 (b) (1) (A) of the Taft-Hartley Act and the one granted by the state.

(1)

The state board's order prohibits certain unlawful activities *per se* for the benefit of all members of the community, irrespective of whether the activities have any coercive effect upon employees. The national board has no authority under sec. 8 (b) (1) (A) except to require discontinuance of coercion of employees by such means

The following provisions of the state board's order are not conditioned upon employment relations. They seek to prevent mass picketing and similar activities because of their interference with rights of the public and third parties, irrespective of whether they involve coercion of employees in the rights guaranteed under either federal or state law:

"It is ordered that the Respondent Unions, their officers, members and agents immediately cease and desist from * * *.

"3. Obstructing or interfering in any way with entrance to and egress from the premises of the Kohler Company.

"4. Obstructing or interfering with the free and uninterrupted use of public roads, streets, highways, railways or private drives leading to the premises of the Kohler Company.

"It is further ordered that the Respondent Unions, their officers, members and agents take the following affirmative action:

"1. Limit the number of pickets around the Kohler Company premises to a total of not more than 200, with not more than 25 at any one entrance. Such pickets are to march in single file and to at all times maintain a space of at least 20 feet in width at each entrance to the Kohler Company premises over which pickets will not pass and on which persons either on foot or in conveyance may freely enter or leave the premises without interference."

The National Labor Relations Board has recognized it has no authority under the federal act to enter such an order.

To establish a violation of sec. 8 (b) (1) (A) it is necessary to show that conduct restrains or coerces employees in their exercise of rights guaranteed by section 7. Theats, violence, mass picketing, or other conduct, even where attributable to a labor organization or its agents, are not prohibited except where it is coercive of employees' rights as to labor activities. See *Local 67, IBT*, 107 NLRB No. 104; *Kanawha Coal Operators Assn*, 94 NLRB 1731.

Because of the consequent limitation upon the remedial power of the national board to prevent the commission of unfair labor practices, board orders are carefully tailored. *Cory Corporation*, 84 NLRB 972, is illustrative.

There the board found that a union restrained and coerced employees in violation of sec. 8 (b) (1) (A) by engaging in mass picketing which obstructed the employees' entrance to and egress from the plant where they were employed. The board ordered the union to cease and desist "from engaging in picketing in such a manner as to bar employees from entering or leaving the plant." (loc. cit. 84 NLRB 980)

Discussing its remedial power, in the *Cory Corporation* case, the board noted that it lacks the power to "affirmatively regulate the number of persons who may properly picket an establishment."

The board continued:

> "That is primarily a matter for the local authorities. Our function rather, as we see it, is limited to determining whether picketing as conducted in a given situation, whether or not accompanied by violence, 'restrained or coerced' employees in the exercise of their rights guaranteed under the Act, and, if so, to enjoin such conduct. In these circumstances the number of pickets has relevance only as it tends to establish the potential or calculated restraining or coercive effect of massed pickets to bar non-striking employees from entering or leaving the plant." (loc. cit. 84 NLRB 977)

That analysis emphasizes the fallacy in appellant's contention that the conduct proscribed in the provisions above quoted constitutes an enjoinable violation of the federal act. These paragraphs are not based upon any finding that the conduct restrained or coerced employees—a finding indispensable to a federal order, but not required by the Wisconsin law.

(2)

None of the findings or prohibitions in the state order have reference to coercion of employees of the Kohler Company; nor to coercion of any employees with respect to such matters as are covered by sec. 7 of the Taft-Hartley act.

Because of the use of the terms "coercing" and "coercion" in the first two provisions of the state board's cease-and-desist order, the appellant argues that they cover the same field as sec. 8 (b) (1) (A).

There are significant qualifications in these provisions which show that the board carefully delimited its action to avoid intruding upon matters with which the national board might be called upon to deal.

The state board's action does not refer to "employees" of the Kohler Company, but to "persons desiring to be employed by the Kohler Co.," thus leaving completely untouched any functions of the national board as to what persons have the status of employees with that company and are entitled to protection as such.

This distinction is significant in that the state action prevents molestation of persons who may not be employees, and who would therefore not be entitled to the protection of remedial action under the federal act. The federal act

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[2] "1. Coercing and intimidating any person desiring to be employed by the Kohler Company in the enjoyment of his legal rights, intimidating his family, picketing his domicile, or injuring the person or property of such persons or his employee.

"2. Hindering or preventing by mass picketing, threats intimidation, force or coercion of any kind the pursuit of lawful work or employment by any person desirous of being employed by the Kohler Company." (R. 9)

prohibits coercion of "employees" only; and the remedial orders of the national board are limited to preventing coercion of "employees" of the designated employers involved in the dispute. See, for example, *Perry Norvell Co.*, 80 NLRB 225, where the order was to "cease and desist from restraining and coercing employees of the Perry Norvell Co." The same is true of the other orders cited in the appellant's brief.

The use of the term "person" instead of "employee" in the first two paragraphs of the state board's order is further significant; because thus the provisions do not proscribe coercion with respect to "employee" rights such as are guaranteed in sec. 7 of the Taft-Hartley Act. Rather, they are directed toward preventing intrusion upon the legal rights of "third parties to earn a livelihood, transact business and engage in the ordinary affairs of life * * * free from molestation, interference, restraint or coercion" (sec. 111.01 (2), supra), wholly apart from the additional rights of self-organization guaranteed them as employees.

Such intent of the state board is further established by the fact that, in referring to the "legal rights" protected against instrusion, it omitted the qualifying words found in sec. 111.06 (2) (a) of the Wisconsin statutes, "including those guaranteed in section 111.04." Sec. 111.04 of the Wisconsin Statutes deals with employee rights similar to those guaranteed in sec. 7 of the Taft-Hartley Act.

The state board's omission of any reference to employees, or to rights guaranteed to employees, was to make it clear that it intended to remain wholly outside the area covered by sec. 8 (b) (1) (A). Its remedial order was not

designed to protect "employee" rights guaranteed by sec. 7; but to protect the ordinary legal rights of third parties, as citizens, to be free from violence and molestation.

(3)

> The state's regulatory action is directed against individuals acting on their own behalf. The national board can give no remedy against individuals except when they act as agents of a labor organization.

The state's cease-and-desist order is directed against "members" of the appellant, in their individual capacities. The order is based on findings that the members engaged in the unlawful activities, without any findings that they acted as agents of the appellant in so doing. Such findings do not show any violation of section 8 (b) (1) (A) of the federal act, and would not support the issuance of any National Labor Relations Board order.

Section 8 (b) (1) (A) provides that it shall be an unfair labor practice "for a labor organization or its agents to restrain or coerce (a) employees in the exercise of the rights guaranteed in Section 7—." Section 10 empowers the National Labor Relations Board to prevent any person from engaging in any such unfair practice affecting commerce, by ordering any person which it finds "has engaged or is engaging in any such unfair labor practice" to cease and desist "from such unfair labor practices."

Accordingly, to direct an order against any employee, union member, or other individual, the board must find

that such person has engaged in prohibited conduct while acting as an agent for a labor organization.

> "The statute does not regulate the conduct of individuals acting in a private capacity; only employees or labor organizations or their agents can commit unfair labor practices." *Sunset Line & Twine Co.*, 79 NLRB 1487, 1507, footnote 37.

Sec. 8 (b) (1) (A):

> "* * * is not directed toward such conduct by persons or employees in their individual capacity." *Perry Norvell Co.*, 80 NLRB 225, 245.

Furthermore, membership in a labor organization does not, *per se*, make the member an agent of the organization within the meaning of the Federal Act. *Sunset Line & Twine Co.*, 79 NLRB 1487, 1507-1508.

D.

The National Labor Relations Board Does Not Deal With a Labor Dispute as a Whole, But Only with Specific Practices as Defined in the Federal Law

The appellant asserts that the complex labor dispute involved in this case is to be handled as an integrated whole by the National Labor Relations Board.

It was never contemplated by Congress that the National Labor Relations Board could, or should, handle an entire labor dispute as an integrated whole. On the contrary, the board was definitely limited to the determina-

tion of certain questions of representation and to the prevention of certain specific unfair labor practices.

In the statement of policy contained in the federal act, there is no implication that the National Labor Relations Board is to decide labor disputes as such. It is limited to proscribing "certain practices on the part of labor and management which affect commerce and are inimical to the general welfare."[2] The findings and policies are to the effect, in part, that "certain" practices by some labor organizations have the intent or necessary effect of burdening or obstructing commerce.

The National Labor Relations Board is not the agency of the federal government delegated to undertake determination of a labor dispute as such. By the same act by which the National Labor Relations Board was given jurisdiction over unfair labor practices, Congress created an independent agency, the Federal Mediation and Conciliation Service, to assist in resolving the dispute as a whole.

No single agency, at least without the services of an army of investigators and representatives at its disposal, could handle all the ramifications of a complex labor dispute. Traffic violations, obstructions of streets, assaults upon persons, injury to property, prevention of picketing of domiciles, and of breaches of the peace in public places may involve hundreds, or even thousands, of separate cases. Questions whether workers injured in passing through picket lines are entitled to workmen's compensation must be settled by separate proceedings. See, for example, Workmen's Compensation Law Reports, Par. 1701, LLR Sum-

[2]Sec. 1 (6), Labor Management Relations Act, 1947, 29 U.S.C.A. sec. 150.

mary, March 9, 1956. The question whether the conduct of pickets precludes unemployment compensation is a matter for separate proceedings. See, for example, *Marathon Electric Mfg. Corp. v. Industrial Comm.*, (1954) 269 Wis. 394, 69 N. W. 2d 573 and *Streeter v. Industrial Comm.*, (1954) 269 Wis. 412, 69 N. W. 2d 583. Wage claims of employees, and other claims arising out of violations of employment contracts must be separately handled." Specific grievances are frequently resolved by arbitration.

Such ramifications of a labor dispute could be enumerated *ad infinitum*.

The National Labor Relations Board has neither the facilities nor the jurisdiction to handle *all* problems arising out of a labor dispute such as this, where thousands of persons engage in mass picketing, highway obstruction, and violence.

The comments of Phillip Ray Rogers, of the National Labor Relations Board, in his address of March 15, 1955, before the Association of General Contractors of America, Inc., at New Orleans, Louisiana, 35 LRR 467, recognized the limitations upon the board in dealing with labor disputes. Among other things he said:

> "Contrary to the apparent belief of many, the Congress did not create the National Labor Relations Board as an agency to settle *labor* disputes. * * *
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> "* * *
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> "In the first place, I believe that the time consumed in resolving these disputes would be prohibitive. In

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[29]For example, see, Ass'n of Westinghouse, etc. Employees v. Westinghouse E. Corp., (1955) 348 U. S. 437, 75 S. Ct. 489.

view of the emergency nature of these cases, time is of the essence, and in view of the involved nature of the Board's procedures, any decision which resulted could be more properly described as an epitaph than a solution."

IV.

THE STATE ACTION IN THIS CASE COULD NOT CONFLICT WITH ANY ADMINISTRATIVE REMEDY WHICH MIGHT BE GRANTED IN PROCEEDINGS BEFORE THE NATIONAL BOARD WITH RESPECT TO THE KOHLER CO. AND ITS EMPLOYEES. ON THE CONTRARY, IT ENDEAVORS TO POLICE THE SITUATION AND TO PRESERVE THE SUBJECT MATTER SO THAT THE NATIONAL BOARD CAN MORE EFFECTUALLY PERFORM ITS FUNCTIONS.

The appellant asserts as an apparent basis for federal-state conflict in the instant case that the National Labor Relations Board has asserted jurisdiction over the employer in representation proceedings. This court has expressly ruled that a certification by the National Labor Relations Board does not oust state jurisdiction with respect to unfair practices not "(listed in sec. 8)." It was said in *Algoma Plywood & Veneer Co. v. Wisconsin Employ. R. Board*, (1949) 336 U. S. 301, 69 S. Ct. 584, 93 L. ed. 691:

> "It remains to consider whether certification of the Union by the National Labor Relations Board in 1942 thereby forever ousted jurisdiction of the Wisconsin Board to enjoin practices forbidden by Wisconsin law. Since the enumeration by the Wagner Act and the Taft-Hartley Act of unfair labor practices over which the National Board has exclusive jurisdiction

does not prevent the States from enforcing their own policies in matters not governed by the federal law, such freedom of action by a State cannot be lost because the National Board has once held an election under the Wagner Act. The character of activities left to State regulation is not changed by the fact of certification."

The appellant has also urged, as a ground of potential conflict, its unfair labor practice charges filed with the National Labor Relations Board July 8, 1954, upon which hearings have not yet been completed. The charges allege that the employer has been guilty of a refusal to bargain collectively, and of discriminatorily discharging a number of employees. The appellant asserts that the employer has offered in defense of its action the conduct which was the basis of the state board's cease-and-desist order.

Nothing in the state action under review could dilute or detract from any finding or order which the National Labor Relations Board might make on those issues. The state court's judgment says nothing except that, in the interim while the National Labor Relations Board is considering the issues of unfair labor practices before it, members of the appellant organization must not engage in violence or mass picketing. This they concededly have no right to do. The state board's findings will not bind the national board. The state board did not attempt to pass upon any issues which are before the national board, such as employee status. It is attempting only to preserve the subject matter so that there will be something upon which the remedies prescribed by the national board—when they are formulated—can operate. If the parties are permitted

in the interim to engage in unrestricted violence and mass picketing, the subject matter upon which the national board is authorized under the federal law to act might be wholly destroyed and the whole matter determined by "primitive methods of trial by combat" rather than "processes of justice."

Such action as was here taken by the state aids, rather than obstructs, the functions of the national board. That is illustrated by the comparable action of the two boards in connection with the dispute involved in *Marathon Electrict Co.*, 106 NLRB 1171.

On May 16, 1952, the Wisconsin Employment Relations Board secured enforcement in the Circuit Court for Marathon County, Wisconsin, of an order prohibiting mass picketing and violence in connection with a strike at the Marathon Electric Company. In March, 1952, unfair practice charges had been filed against the employer with the National Labor Relations Board, involving some of the same activities. The proceedings of the National Labor Relations Board upon the unfair practice charges took a period of eighteen months. The board's order was issued September 29, 1953.

Because of the fact that the state action made it unnecessary for the National board to police the situation, it was enabled to conduct its proceedings with the deliberateness necessary to the satisfactory conclusion of the complex questions raised in connection with unfair practices and defenses under the federal act.

The action of the state board in the case before the court has not been urged before the National Labor Relations Board either in support of, or in defense to, any charge to be decided by the latter.

If the National Labor Relations Board deemed the state's cease-and-desist order to have even a tendency to interfere with the proceedings pending before it, it could protect its jurisdiction by bringing action to restrain state proceedings as was done in *Capital Service v. National Labor Relations Board*, (1954) 347 U. S. 521, 74 S. Ct. 699. The fact that it has not done so presumably demonstrates that the state action is not interfering with the administration of the federal law.

The National Labor Relations Board has also appeared before this court as *amicus curiae* in opposition to state jurisdiction in a number of cases.[*] If the national board had any fear that the state regulation in this case would interfere with its functions, it would at the very least present its position to the court as *amicus curiae*.

If the national board does not appear to oppose state jurisdiction in this case, we believe it can be assumed that the action under review falls within the permissible area for state action under the administrative construction set out by the board's memorandum filed in *United Workers v. Laburnum Corp.*, (1954) 347 U. S. 656, 74 S. Ct. 833, 98 L. ed. 1025:

> "The Board recognizes, of course, as this court recently stated in Garner v. Teamsters, etc. Union, 346

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[*] For example,

Weber v. Anheuser-Busch, Inc., (1955) 348 U. S. 468, 75 S. Ct. 480

United Workers v. Laburnum Corp., (1954) 347 U. S. 656, 74 S. Ct. 833, 98 L. ed. 1025

Garner v. Teamsters Union, (1953) 346 U. S. 485, 74 S. Ct. 161, 98 L. ed. 228

Wisconsin E. R. Board v. Plankinton Packing Co., (1950) 338 U. S. 953, 70 S. Ct. 491, 94 L. ed. 588

La Crosse Telephone Corp. v. Wisconsin Employ. Rel. Bd., (1949) 336 U. S. 18, 69 S. Ct. 379, 93 L. ed. 463

U. S. 485, 488, that under the act the states 'still may exercise (their) historic powers over such traditionally local matters as public safety and order and the use of streets and highways.'

"Appearing before the Senate Committee on Labor and Public Welfare in 1953 the Board's then chairman (Mr. Herzog) stated—

'There are, of course, aspects of labor controversies which the States have traditionally been free to control. Although earlier witnesses have apparently sought to convey a contrary impression, the Labor-Management Relations Act of 1947 has not cut into that freedom. We speak of the inherent police power of each sovereign state to deal with acts of violence or other threats to the peace.' Hearings before Senate Committee on Labor and Public Welfare, 83d Cong. 1st Sess. Part 4, P. 2123-2124, 2107.

"This statement continues to represent the Board's present views."

V.

IMMEDIATE PREVENTIVE ACTION AT THE STATE LEVEL IS NEEDED TO COPE WITH VIOLENCE

We believe that the kind of state regulation here involved is a practical necessity if the better law enforcement which Congress sought to encourage is to have the desired effect of preventing labor violence.

In a village such as that involved in this case, with a population of 1,716, the normal complement of policemen is three or four. Obviously they are inadequate to handle mass picketing involving 3,000 participants, certainly not

without definitive guidance. Even if they were able to identify and arrest all of the hundreds of disturbers, the local courts could not expeditiously handle the influx of trials in addition to their usual duties.

Many of the objectionable actions in these cases result from a lack of understanding what is permissible. If the excesses can be held in control by notifying participants through governmental order what is permissible and what is not, surely that is better than wholesale arrests or calling out the troops.

The violent conduct which sometimes causes havoc in labor disputes flares quickly and requires immediate action by local authorities—else the damage will be done.

CONCLUSION

It is respectfully submitted that the judgment from which appeal was taken should be affirmed.

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APPENDIX

Portion of the Taft-Hartley Act which Appellant Alleges Have Been Infringed	Portion of the State Law Applied in this Case
Sec. 8 (b) It shall be an unfair practice for a labor organization or its agents—	Sec. 111.06 * * *
(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in sec. 7	(2) It shall be an unfair practice for an employee individually or in concert with others (a) To coerce or intimidate an employee in the enjoyment of his legal rights * * * *or* to intimidate his family, picket his domicile, or injure the person or property of such employee or his family. (Emphasis supplied) * * * (f) To hinder or prevent, by mass picketing, threats, intimidation, force or coercion of any kind the pursuit of any lawful work or employment, or to obstruct or interfere with entrance to or egress from any place of employment, or to obstruct or interfere with free and uninterrupted use of public roads, streets, highways, railways, airports, or other ways of travel or conveyance.

(3) It shall be an unfair practice for any person to do or cause to be done * * * in connection with * * * any controversy as to employment relations any act prohibited by subsections (1) and (2) of this section.